RECORD AND BRIEFS

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No. 16-499

In the Supreme Court of the United States

JOSEPH JESNER, *et al.*,

Petitioners,

v.

ARAB BANK PLC,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF ADMIRALTY LAW PROFESSORS THOMAS J. SCHOENBAUM, GEORGE RUTHERGLEN, AND JOEL SAMUELS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI

Amicus Thomas J. Schoenbaum is the Harold S. Shefelman Distinguished Professor of Law at the University of Washington, in Seattle, Washington, and the Dean Rusk Professor of International Law, Emeritus at the University of Georgia, and an attorney who has spent much of his professional life in the practice, teaching, and research of admiralty and maritime law. He is the founding Executive Director of the Tulane Maritime Law Center (1979-1983). He has taught law since 1968 at the University of North Carolina at Chapel Hill, Tulane University, University of Georgia, International Christian University (Tokyo), George Washington University, and the University of Washington. Amicus is the author of many books and articles on admiralty and maritime law as well as international law topics. His major work, considered a leading work on the law, is *Admiralty and Maritime Law, Practitioners Edition* (Westgroup, 5th ed. 2011). This treatise and its previous editions are regularly cited by the federal and state courts, including by this Court.[1]

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[1] Pursuant to Rule 37.6, amici certify that no counsel for a party authored this brief, in whole or part, and that no counsel for a party made a monetary contribution intended to fund preparation or submission of the brief. Preparation and submission of the brief has been funded entirely by counsel of record for amici. Pursuant to Rule 37.2(a), the parties have consented to the filing of the brief of amici curiae, with letters of consent previously lodged with the Court.

F. Black Research Professor of Law at the University of Virginia. He has taught there since 1976 and practices regularly in federal and state court, in admiralty and in other cases. He has written widely in books and articles on admiralty, international civil litigation, civil procedure, and civil rights.

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Amici have never before worked on or had any contact with the case at bar. Amici are members of the Bar of this Court. The only interest of amici in this case is concern for justice and the proper development of the important field of admiralty and maritime law. Amici regards this case as very important to these concerns.

SUMMARY OF ARGUMENT

Congress enacted the Alien Tort Statute against the background of maritime law as an essential component of the law nations. Maritime prohibitions

and remedies, especially with respect to piracy, figure prominently in interpretation of the statute. No maritime cases from the Founding Era, or before, granted immunity to any private actor, and business entities such as the English East India Company, insurance syndicates, and partnerships could be sued in admiralty. Early admiralty cases in the United States, such as those on piracy, followed foreign decisions and international law. Entities such as ships were held liable in tort, as were business entities such as partnerships. When corporations became common in the nineteenth century, American courts in maritime cases extended jurisdiction over them and imposed liability in tort without discussion. The Alien Tort Statute should be interpreted to reach the same result based on the historic role of admiralty in remedying torts in violation of the law of nations.

ARGUMENT

I. International Maritime Law from the Founding Era Informs Interpretation of the Alien Tort Statute

In *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 730 (2004), this Court reasoned that the First Congress, which enacted the Alien Tort Statute (ATS), 28 U.S.C. § 1350, "assumed that federal courts could properly identify some international norms as enforceable in the exercise of § 1350 jurisdiction." Those norms comprised two principal elements: first, a body of law covering "general norms governing the behavior of national states with each other," *id.* at 714; and second, a "body of judge-made law regulating the conduct of individuals situated outside

domestic boundaries," including the law merchant relating to trade and maritime cases. *Id.* at 715. The ATS focused on the sphere where those two elements overlapped, as in the law of piracy: "It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATS with its reference to tort." *Id.* at 715.

International maritime law, was received into American law at the founding, as discussed more fully in Part II. Maritime law included the traditional remedy of actions *in rem*, which were a pervasive feature of admiralty decisions in the early Republic. *In rem* actions imposed a form of vicarious liability upon the owner of the vessel, depriving the owner of all interest in the vessel in satisfaction of a valid claim. Justice Joseph Story, the leading authority on admiralty and international law in the early nineteenth century, emphasized the kind of strict, vicarious liability imposed upon a vessel owner by a judgment *in rem*:

> It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the

> offence or wrong, or insuring an indemnity to the injured party.

The Malek Adhel, 43 U.S. (2 How.) 210, 233 (1844).

A. *In Rem* Actions in the Founding Era Imposed a Form of Enterprise Liability for Torts in Violation of the Law of Nations

Before the advent of general corporation laws in the middle of the nineteenth century, *in rem* actions constituted the principal means of imposing enterprise liability for business torts. The *in rem* action was commenced then, as it is now, by seizure of the vessel, and any resulting judgment was satisfied by sale or forfeiture of the vessel. Although liability was limited to the value of the vessel, it was no more limited then than the liability shareholders is now for wrongs committed by corporate agents. Vessel owners could lose their entire stake in the enterprise, just as modern shareholders can lose the entire value of their stock.

Vessels were at the time one of the most valuable capital assets in commerce and maritime commerce played a prominent role in the American economy and in American law. As a leading historian of the Marshall Court has observed: "because of the importance of maritime commerce in the American economy and the special role apparently carved out for the federal courts in admiralty cases by the Constitution, admiralty jurisdiction cases came early and often to the Court's docket." G. Edward White,

The Marshall Court and Cultural Change, 1815-35 at 428 (1986).

In rem actions in admiralty extended to all torts and other offenses, including those that fell within the definition of piracy. *The Malek Adhel* was one such case, where the vessel was seized and forfeited as part of a criminal prosecution for piracy. 43 U.S. at 229. Another such case involved civil claims for piracy, and although those claims were not upheld, Justice Story linked the remedies for piracy directly to seizure in an *in rem* action:

> Pirates may, without doubt, be lawfully captured on the ocean by the public or private ships of every nation; for they are, in truth, the common enemies of all mankind, and, as such, are liable to the extreme rights of war. And a piratical aggression by an armed vessel sailing under the regular flag of any nation may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations.

The Marianna Flora, 24 U.S. (11 Wheat.) 1, 40-41 (1825).

In *The Rebecca*, 20 F. Cas. 187 (D. Me. 1831) (No. 11,619), the court found the origin of *in rem* liability in the practice of many merchants in the Middle Ages to engage in commerce in the form of limited liability entities called *commenda*. These resemble the modern limited liability partnerships. Imposing liability on the ship for tortious conduct effectively

imposed liability on the *commenda*, while still formally respecting limited liability in the organization's charter. *Id.* at 378.

B. Corporate Liability has been Accepted in Maritime Law Since the Founding Era

Corporations were accepted without question as defendants in early maritime cases. *See, e.g.*, *The Maryland Ins. Co.* v. *Woods*, 10 U.S. (6 Cranch) 29 (1810) (marine insurance case); *New Jersey Steam Nav. Co.* v. *Merchant's Bank of Boston*, 47 U.S. (6 How.) 344 (1848) (marine cargo case). In the nineteenth century this Court also recognized that corporations may be liable in tort under the general maritime law. *E.g.*, *Philadelphia, Wilmington & Baltimore R.R. Co.* v. *Philadelphia & Havre de Grace Steam Towboat Co.*, 64 U.S. (23 How.) 209 (1859).

Congress reached the same conclusion in the Limitation Act of Vessel Owner's Liability Act, 9 Stat. 635 (1851), codified as amended, 46 U.S.C. § 30501 *et seq.* (2012). This Act presupposes that vessel owners, whether as individuals, corporations, or other business entities, can be held liable in admiralty. The Act limits the owner's liability to "the value of the vessel and pending freight." *Id.* § 30505(a). It effectively creates a ceiling on the owner's liability in an action *in personam*, analogous to the limit on liability in actions *in rem*. It applies, however, only to maritime claims arising "without the privity or knowledge of the owner." *Id.* § 30505(b). Before adoption of the Act, it was accepted that corporations

could be owners of vessels. *New Jersey Steam Navigation, supra*, 47 U.S. at 350.

In accord with these statutory provisions, this Court has imposed liability without limitation upon corporate owner with "privity or knowledge" based on the actions of a corporate manager. *Spencer Kellogg & Sons, Inc.* v. *Hicks*, 285 U.S. 502, 510-12 (1932). More recently, this Court addressed the scope of the Act as applied to a corporate defendant in *Jerome R. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995). A freight tunnel under the Chicago Loop had flooded, allegedly because the "Great Lakes Dredge and Dock Co. had used a crane, sitting on a barge in the river next to a bridge, to drive piles into the riverbed above the tunnel." *Id.* at 529. This Court framed the issue before it in terms of the corporation's liability: "whether a court of the United States has admiralty jurisdiction to determine and limit the extent of Great Lakes's tort liability." *Id.* This Court assumed the existence of corporate liability in admiralty just as it had in decisions nearly two centuries earlier.

II. Federal Maritime Law has Incorporated and Adapted International Maritime Law Since the Founding Era

The maritime law was part of the law of nations to which this Court referred in *Sosa*. 542 U.S. at 714-15. This body of maritime law, a part of the "law merchant," has existed for 3,000 years or more. *R.M.S. Titanic, Inc.* v. *Haver*, 171 F.3d 943, 960 (4th Cir. 1999). The ancient sea laws were codified by the Byzantine Emperor Justinian as the *Rhodian*

Sea Laws, part of the *Corpus Juris Civilis* (533 C.E.). *See The Rhodian Sea Law* (Ashburner ed. 1909). In the Middle Ages these laws were adopted by cities in Italy and Spain as well as England (the *Laws of Oleron*, 1189), and later by the Hanseatic League (1597). *See* Frederic Sanborn, *Origins of the Early English Maritime and Commercial Law*, 44 Harv. L. Rev. 1160 (1931). From Europe these laws came to the United States. Thomas J. Schoenbaum, *Admiralty and Maritime Law, Practitioners' Edition* 18-21 (5th ed. 2011).

In *Panama R.R. Co.* v. *Johnson*, 264 U.S. 375, 385-86 (1924), this Court recognized that the grant of admiralty jurisdiction in Article III, section 2, incorporated international maritime law into the laws of the United States. This source of law "embodied the principles of the general maritime law, sometimes called the law of the sea, with modifications and supplements adjusting it to conditions and needs on this side of the Atlantic. The framers of the Constitution were familiar with that system and proceeded with it in mind." *Id.* at 386. This Court recognized that the Founders did not intend to "strike down or abrogate the system," but instead sought to bring it under "national control," "subject to power in Congress to alter, qualify, or supplement it as experience or changing conditions might require." *Id.*

Like Congress, the federal judiciary also has authority to continue the development of the general maritime law adopted in the Founding Era. In *Romero* v. *International Terminal Operating Co.*,

358 U.S. 354, 360-61 (1959), this Court stated that Article III, section 2, "empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction' ... and to continue the development of this law." Before the Constitution was adopted, the general maritime law was solely the law of nations, part of the ancient "law merchant." But after the Constitution was adopted the general maritime law became, *in addition*, part of the laws of the United States. *See The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law ....").

In *DeLovio* v. *Boit*, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3,776), Justice Story provided a comprehensive history of international maritime cases. Although concerned with the discrete issue of admiralty jurisdiction over insurance claims, and written only in his capacity as a Circuit Justice, his opinion exercised a pervasive influence over the Marshall Court's admiralty decisions, and through them, on the development of maritime law. White, *supra*, at 443 ("*DeLovio* can be seen as the unacknowledged but omnipresent backdrop to all the Marshall Court admiralty cases"). Justice Story engaged in a detailed discussion of the exercise of maritime jurisdiction by the English courts as well as courts in continental Europe. From analysis of all "learned treatises on the admiralty jurisdiction" Story concluded that the exercise of maritime jurisdiction was "coeval and coextensive" in English and in other foreign courts, "over all maritime torts,

offenses and contracts ... and regulated by the same principles ..., the ancient customs of the sea." *DeLovio*, 7 F. Cas. at 421. In particular, Justice Story singles out the fact that "merchant strangers" who committed a robbery at sea could be arrested with their goods and that courts could "keep them under arrest until they have satisfied the party his damages." *Id.* at 422. Justice Story's account is devoid of any hint of immunity for any private actor or entity.

III. Courts in Other Nations have Recognized Corporate Liability as Part of International Maritime Law

In maritime cases, "courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality." *Lauritzen* v. *Larsen*, 345 U.S. 571, 581 (1953); *see also Ex Parte Western Maid*, 257 U.S. 419, 432 (1922); *United States* v. *W. M. Webb, Inc.*, 397 U.S. 179, 191 (1970). That body of law reveals no record of any immunity from suit for any private actor in the centuries leading up to the adoption of the Constitution and the enactment of the Alien Tort Statute. On the contrary, the cases involved a wide variety of business forms as well as individual, breathing persons.

A famous maritime law case in which a corporation was a litigant is the *Santa Catarina* prize proceeding in the Amsterdam Admiralty Court in 1604. This case arose out of the capture, in 1603, of the *Santa Catarina*, a Portuguese merchant vessel, in the Straits of Singapore by the Dutch Admiral

Jacob van Heemskerck, who was in the employ of the United Amsterdam Company, then closely associated with the newly created Dutch East India Company. The Santa Catarina and her cargo were taken to Amsterdam by the Dutch East India Company, which had been chartered by the Estates-General of the Netherlands in 1602, and granted a monopoly for the East Indies trade. In 1604, the Amsterdam Admiralty Court decreed the vessel and her cargo subject to the law of prize and ordered the proceeds to accrue to the Dutch East India Company. The ruling was justified by the court on the grounds that the Dutch Republic, which had broken away from Spain in 1581, was at war with the Iberian Union (1581-1640), the united Spanish and Portuguese state of the time. This history is recounted in Peter Borschberg, *Hugo Grotius, the Portuguese, and Free Trade in the East Indies* 40-51 (Singapore and Leiden: NUS Press, 2011) and Edward Gordon, Grotius and the Freedom of the Seas in the Seventeenth Century, 16 *Willamette J. of Int'l L. & Dispute Resolution* 252 (2008).

The *Santa Catarina* case is especially celebrated because, when the Iberian Union objected to the ruling, on the ground that only Portuguese vessels had the legal right to navigate in the seas where the vessel was captured, the young scholar Hugo Grotius (1583-1645) was retained to write a justification of the Dutch East India Company's legal position. Grotius wrote his well-known work, *De Jure Praedae* (On the Law of Prize) in response to this commission. Although the entire *De Jure Praedae* was not published until 1864, an especially relevant chapter was published in November, 1608, under the

title, *Mare Liberum* (The Free Sea), a legal "Brandeis Brief" on the right to freedom of navigation of the seas and free trade, in opposition to the claims of the Spanish and Portuguese crown to enclose large portions of the oceans, including areas around the East Indies, as sovereign territories. For a modern translation, *see* Hugo Grotius, *The Freedom of the Seas* (Ralph Van DeMan Magoffin, trans. New York: Oxford University Press, 1916). In this work Grotius argued to the court, that "he who prevents another from navigating the sea has no support in law." Citing the Roman jurist Ulpian, Grotius further argues that such a person is liable for damages and injunctive relief. *Id.* at 44. Grotius wrote that, "The law by which our case is to be decided is not difficult to find, seeing that it is the same among all nations." *Id.* at 5.

Mare Liberum is justifiably famous as a work that helped Grotius to lay claim to be the "father of international law." He also won his case: in *The Santa Catarina*, the Amsterdam Admiralty Court accepted jurisdiction over both the Dutch East India Company as defendant and the vessel and her cargo as plaintiffs.

Later in the seventeenth century, the English East India Company (chartered in 1600 by Queen Elizabeth I) was held liable to pay damages in an international maritime tort case by the English House of Lords. *The Case of Thomas Skinner, Merchant* v. *The East India Company* (1666) 6 State Trials 710 (H.L.). This case stemmed from a petition presented to King Charles II by Thomas Skinner,

complaining of "great oppressions and spoils sustained by him in the Indies" by the Company, which he alleged assaulted his person, robbed him of his ship and goods, and confiscated his island plantation in 1658. The King ordered the petition to be heard by the House of Lords. *Id.* at 711. The English East India Company by its Secretary filed a pleading in the House of Lords denying liability, primarily on the ground that "the Company are not liable for ... the action of their factors [agents], unless done by their order." *Id.* at 713-14. Before deciding the case, the Lords requested an opinion from the King's courts at Westminster Hall. The Chief Justice reported that all the judges agreed that at least part of the case, the confiscation of the island property, as "a robbery committed *super altum mare*," was "not relievable in any ordinary court of law." *Id.* at 719. The House of Lords then heard the case and found the East India Company liable for 5000 pounds in damages. The Lords based their decision on the fact that the incidents in question were not merely ordinary wrongs, but were also "a violent interruption of the trade of the nation; which concerns the government of the kingdom, is a matter of state, and highly entrenches upon the authority of the king." *Id.* at 788.

The Company meanwhile filed a petition in the English House of Commons contesting the jurisdiction of the House of Lords, not because of any immunity, but because the Lords had exceeded their authority by hearing a first instance case. *Id.* at 721-24. This Petition precipitated a row between the House of Lords and the House of Commons lasting

over two years, during which both chambers held to their respective positions. Then the House of Commons in 1669 passed a resolution that "whoever should be aiding, in execution of the order of the Lords in the case of Skinner against the East India Company, should be deemed a betrayer of the rights and liberties of the Commons of England and an infringer of the privileges of the House of Commons." *Id.* at 763. King Charles proposed a compromise to end the quarrel, but this was rejected by the Commons. In the end, the King and Lords backed down. The King, "for the sake of pecuniary supply proposed a retreat to [the Lords]" and the judgment against the East India Company was vacated by the Lords in 1670. *Id.* at 779.

Skinner's Case demonstrates that the English East India Company was not immune from suit and that it could avoid liability for a maritime tort only through the extraordinary intervention of the King. In this respect, it is entirely in accord with tort principles today imposing liability upon corporations. The Alien Tort Statute should be interpreted according to the same principles.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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